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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AMALGAMATED TRANSIT UNION,  
LOCAL 1589,

Plaintiff and Appellant,

v.

LONG BEACH PUBLIC  
TRANSPORTATION CO., et al.,

Defendants and Respondents.

B205440

(Los Angeles County  
Super. Ct. No. BS107627)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Neyhart, Anderson, Flynn & Grosboll, William J. Flynn and Benjamin K. Lunch for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, Robert L. Wenzel and Amber M. Solano for Defendants and Respondents Long Beach Public Transportation Company and the City of Long Beach.

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The question presented by this appeal is whether public transit bus drivers who begin a work shift at one location (“starting point”) and end at another location (“ending point”) must be paid for travel time back to the starting point. The bus drivers’ union filed a petition for a writ of mandate seeking to compel the employer to compensate the bus drivers for this travel time. The trial court denied the petition. Because it is undisputed that the employer does not require the bus drivers to return to the starting point at the end of the workday, and, in fact, some bus drivers begin the commute home directly from the ending point, we conclude that the employer is not required to pay the bus drivers for this travel time. We, therefore, affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Appellant Amalgamated Transit Union, Local 1589 (the “Union”) is the exclusive representative of transportation industry employees, including bus drivers. Some of those bus drivers are employed by Respondent Long Beach Public Transportation Company (“LBT”). LBT is a public, non-profit corporation that provides public transportation services in Long Beach and various surrounding cities. Respondent City of Long Beach (“City”) is the sole shareholder of LBT.

Three times each year bus drivers “bid” for the particular route they will be assigned for the next four months. All bidding is done by seniority.<sup>1</sup> Before the bidding commences, LBT sends a route list to the Union identifying all routes that will be in service. For each route, the list identifies the starting and ending locations, the time the route begins, the time the route ends, the duration of the route, whether the run is a straight run or a split shift, whether the route involves overtime, and the days the route is driven. Not all shifts begin and end at the bus yard; some begin and end on the streets. Some routes have the same starting and ending points; others have a starting point that is

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<sup>1</sup> Some drivers do not bid a regular run but instead work on the “extra board,” receiving fill-in assignments for regular drivers who are unavailable due to sickness or vacation.

different from the ending point. For those routes that have different starting and ending points, the distance between the starting and ending point may be a few feet or several miles, depending on the route.

LBT requires bus drivers to report to the starting point of their routes at the beginning of their shifts. A driver is not required to report to the bus yard before going to the starting point. Likewise, if the ending point of the route is on the street, the bus driver is not required to return to the bus yard to conclude his or her shift, but is free to go directly home or engage in other personal activities. Normally, bus drivers will use their own personal vehicles to get to work and park either in the bus yard or at the starting or ending point, but LBT does not require them to do so. Not all bus drivers drive personal vehicles to work. LBT allows, but does not require, bus drivers to use relief vehicles or ride the buses free of charge from their ending point to the yard or to their starting point. Bus drivers may also ride the buses free of charge to begin the commute directly home from their ending point or to travel to other locations of their choice at the conclusion of a shift. In addition, some drivers get dropped off at their starting points and picked up at their ending points. When they get picked up at the ending point, they are free to begin the commute directly home. If, at the end of his or her shift, a bus driver chooses to travel from the route's ending point back to the starting point, LBT does not compensate that bus driver for the travel time involved.

The Union sought a writ of mandate in the superior court directing LBT and the City to “cease their practice of failing to compensate Bus Operators employed by LBT for time spent traveling at the end of each shift [from their ending point back to their starting point].” Relevant to this appeal, the writ petition alleged that Respondents’ failure to pay for that travel time violated California Labor Code sections 221, 222, and 223<sup>2</sup> and Industrial Welfare Commission (“IWC”) Wage Order 9-2001 (See Cal. Admin. Code, tit. 8, § 11090(1)(B) (hereinafter “Wage Order 9”).) After a hearing, the trial court denied the writ petition.

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<sup>2</sup> Unless otherwise noted, all further statutory references are to the Labor Code.

## DISCUSSION

“In reviewing a trial court’s judgment on a petition for writ of ordinary mandamus, we apply the substantial evidence test to the trial court’s factual findings. We exercise our independent judgment on questions of law. [Citation]” (*Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 980.) Here, however, the Union does not dispute the trial court’s factual findings, and takes issue only with the trial court’s legal conclusions. Hence, our review is de novo.

### ***Applicability of the Labor Code to LBT.*<sup>3</sup>**

“Sections 221, 222, and 223 articulate the principal [*sic*] that all hours must be paid at the statutory or agreed rate . . .” (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 (*Armenta*).) Section 2(G) of Wage Order 9 defines “hours worked” by an employee as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” LBT argues that (1) these sections of the Labor Code are inapplicable because LBT is a public entity, and (2) the IWC exceeded its authority when it included public entities within the scope of section 2 of Wage Order 9. We disagree.

Section 220(b) states that “Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation.” (Lab. Code, § 220, subd. (b).) By explicitly exempting public entities from compliance with those specific sections within that same chapter and article of the Labor Code, the Legislature impliedly expressed an intent that public entities be subject to the remaining sections. (See *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 437 [“Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in

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<sup>3</sup> Because the Union’s substantive arguments are directed to LBT’s conduct as the bus drivers’ employer, we will not burden this opinion with repeated reference to both LBT and the City, but will refer to the City only when significant to our analysis.

a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citations.]”].) Therefore, LBT must comply with Sections 221 through 223. Further, Section 1173 authorizes the IWC to promulgate orders establishing minimum wages for “all employees in this state.” (Lab. Code, § 1173.) Nothing in section 1173 precludes the IWC from establishing orders regarding minimum wages paid by public entities. Moreover, because we conclude that the relevant Labor Code sections apply to public entities, we reject the argument that the IWC exceeded its authority when it included public entities within the scope of section 2 of Wage Order 9.

***Compensability of Travel Time as “Hours Worked.”***

The Union takes the position that whenever an employee is required to start work and end work in two different locations, the employer must pay employees to travel back to the starting point. The Union argues that bus drivers remain “subject to the control” of LBT during the travel time from the ending point back to the starting point and, hence, the California Supreme Court’s decision in *Morillion v. Royal Packing Co.*, (2000) 22 Cal.4th 575 (*Morillion*) is on point. In fact, we conclude the control exercised by the employer over the employees’ travel time in *Morillion* serves only to highlight the lack of control exercised by LBT here.

In *Morillion*, an employer required its agricultural employees to assemble for work each day at a particular departure point. From there, the employer provided buses that took the employees to the fields where they were to perform work. These employer-provided buses also transported the workers back to the departure point at the end of the day. (*Morillion, supra*, 22 Cal.4th at p. 579.) Because the employer *required* employees to travel to and from the departure point on employer-provided buses, the Court held that the employees were “subject to the control” of the employer during that travel time and, under the applicable wage order (the relevant language of which is identical to the wage order at issue here) such time was compensable as “hours worked.” (*Id.* at p. 587.) The Court went on to note, “while the time . . . spent traveling on [the employer’s] buses to and from the fields is compensable as ‘hours worked’ . . . , the time plaintiffs spent commuting from home to the departure points and back again is not. Moreover, we

emphasize that employers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as ‘hours worked.’” (*Id.* at p. 588.)

Key to the Court’s determination in *Morillion* that travel time was compensable was the fact that the employer controlled “when, where, and how [employees were] to travel” between the departure point and the fields. (22 Cal.4th at p. 588.) LBT, on the other hand, exercises no control whatsoever as to the bus driver’s mode or method of travel at the end point of the route. An employee may choose to use public transportation or be picked up and begin the commute home or to another destination. He or she may choose to engage in personal activities at the ending point of the route. Or, if the employee left a personal vehicle at the starting point of the route, he or she may return to the starting point. As it is the employee’s choice, the employee is not subject to LBT’s control.

The Union claims that bus drivers have no real choice but to park a car at some point on their route at the beginning of their shift and travel back to that location at the conclusion of their shift. There are two problems with this argument. First, it is a factual argument (i.e., that all bus drivers use their personal vehicles to get to work) that the trial court found was lacking in evidentiary support.<sup>4</sup> Second, a similar argument was rejected in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 (*Overton*).

In *Overton*, the named plaintiff was a Disney employee whose assigned parking lot was one mile from the employee entrance, and who took a Disney-provided shuttle

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<sup>4</sup> The trial court found that the Union made several factual assumptions unsupported by evidence. Likewise, the Union asks this court to “[a]ssume that a bus driver lives 0.5 miles from his or her start point but 1.5 miles from his or her endpoint. This case concerns the 1.0 mile between those two points not the ‘normal commute.’” The Union does not explain why we should make that assumption when there are no facts to support it. An equally likely assumption is that an employee who bids on a route with different starting and ending points may well choose one with an endpoint closer to his or her residence. However, both are mere assumptions without evidence, and neither can form the basis for our decision.

from the lot to the employee entrance. He brought an action on behalf of “all Disney employees who parked in the satellite lot, seeking compensation for their travel time on the [Disney-provided] shuttle.” (*Overton*, *supra*, 136 Cal.App.4th at p. 265.) He argued—in a similar vein to the Union’s argument here—that “as a practical matter [he was] required to use an employer-provided shuttle because no alternative transportation [was] available or feasible.” (*Id.* at p. 272.) The court rejected that argument. Although the undisputed facts showed that 90 percent of employees did park in the satellite lot and use Disney shuttles, Disney did not require its employees to park in the lot, as evidenced by the fact that the remaining 10 percent used alternate transportation that allowed them to bypass the shuttle altogether. (*Id.* at p. 271.) The *Overton* court analyzed *Morillion* as follows: “Our Supreme Court concluded that the denial of compensation for the bus time in *Vega* [*v. Gaspar* (5th Cir. 1994) 36 F.3d 417] was proper because the employees had a *freedom to choose* alternative forms of transportation. On these facts, this could only mean that choosing alternative means was *permitted* by the employer, not that it was a realistic possibility for the employees.” (*Id.* at p. 273, fn. 15.) As in *Overton*, LBT’s bus drivers are permitted to bypass any travel time from the ending point to the starting point by making alternative transportation arrangements. Moreover, in the present case, alternative transportation *is* a “realistic possibility” for the bus drivers, as the uncontroverted evidence reflects that some bus drivers do begin their commute home directly from the ending point.

The Union requests that this Court take judicial notice of a Division of Labor Standards Enforcement Opinion Letter dated January 29, 2002 (the “Letter”). The Letter addresses whether, under the factual circumstances described in the Letter, bus and light rail vehicle operators of the Sacramento Regional Transit District whose shift ends at a different location than where it began must be paid for travel back to the starting point. While we take judicial notice of the Letter,<sup>5</sup> we find it neither relevant on its facts nor

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<sup>5</sup> The trial court refused to take judicial notice of the Letter, noting that it “contains only the legal opinion of the writer, and there is no evidence before the court that the Department [sic] of Labor Standards Enforcement ever adopted or attempted to enforce

persuasive in its reasoning, and therefore decline to afford it any weight. (*See Armenta, supra*, 135 Cal.App.4th at p. 324 [finding the Letter persuasive on other grounds, but noting that “the opinion letter was not entitled to deference and did not have the force of law. [Citations.]”])

First, as a factual matter, the Letter addresses those employees whose shifts begin and/or end when public transportation is not running. The Letter specifically notes that those drivers “*must* first travel after their shift ends from their end-shift locations . . . to their start-shift locations in order to get back home.” (Italics added.) By contrast, the trial court below found that “[n]o evidence is before the court, however, that any driver employed by the bus company is confronted with such a situation. . . . The issue regarding such drivers is therefore not before the court in this proceeding, and the court expresses no opinion with respect thereto.” Second, the Letter determines that transit employees whose shifts end in a location different from where they started are subject to the control of their employer because “absent the employer’s control, the employee would undoubtedly not have chosen to end his or her shift at a location different from that where it began.” We find that limited analysis entirely unhelpful and contrary to case law. Indeed, absent the employer’s control in *Overton*, the employees “would undoubtedly not have chosen” to have the only available parking lot located a mile away from the employee entrance to the park. Absent *almost every* employer’s control over the location at which work is to be performed, employees undoubtedly would not choose lengthy commutes to and from work. But the length of the commute or the fact that, but for the employer’s control over the location of the work, the employee would have a shorter or easier commute, is not the relevant standard for determining the compensability of travel time. The standard developed in *Morillion* and applied in *Overton* to determine the compensability of travel time is not whether an employer exercises control over the *place of employment*, but rather, whether the employer was

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the opinions set forth in the letter.” We agree with the trial court’s characterization of the Letter. However, we may nonetheless take judicial notice of it. (Evid. Code, § 452, subd. (c).)

“direct[ing] and “command[ing]” employees’ *travel time* such that the employer “control[led]’ them within the meaning of ‘hours worked’” *during that travel time*. (*Morillion, supra*, 22 Cal.4th at p. 587.)

Because we conclude that LBT is not required to pay its bus drivers to travel from the ending point back to the starting point of the route, we do not reach the issue of whether the City is liable for the acts of the employer, LBT, or whether that issue was adequately preserved for our review.

### **DISPOSITION**

The judgment denying appellant’s petition for writ of mandate is affirmed.  
NOT TO BE PUBLISHED.

TUCKER, J.\*

I concur:

ROTHSCHILD, J.

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\* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

MALLANO, P. J., Dissenting.

I would reverse to keep faith with the “ancient adage that the laborer is worthy of his hire.” (*Johnson v. Smith* (1954) 128 Cal.App.2d Supp. 859, 863.)

Here, the employer requires that a driver start his shift from one point and end at another point, thus requiring the driver to return to the starting point some time before starting the following day’s shift. I think that the employer must pay the driver for the return trip because the driver has no choice but to expend that time.

In *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*), agricultural workers were compelled to be at a starting point for a bus ride to the fields and return to the same point at the end of the work day. Because they were “subject to the control” of the employer, they were entitled to be paid for the bus ride. The Supreme Court distinguished this situation from a commute to the workplace from and to home. In contrast, in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 (*Overton*), Disney workers had to show up for work at the employees’ gate at Disneyland, but could take advantage of free employee parking at a lot a distance away and a shuttle ride to the employees’ gate if they wished. Because they could choose not to do so, the Court of Appeal held that they were not “subject to the control” of the employer and, accordingly, not entitled to be paid for the shuttle ride.

Here, the employer requires that a driver start from one point and end at another point. The driver must spend time returning to the starting point at some time, because that is where the following day’s shift starts. To this extent, the driver is “subject to the control” of the employer just as the agricultural workers were in *Morillion* because the driver is not given a choice. The driver is unlike the employee in *Overton* who could choose not to park for free in the employer’s parking lot and take the employer’s shuttle to the workplace. This freedom to choose led the *Overton* court to conclude that the employee was not “subject to the control” of the employer under *Morillion* and not entitled to wages for the shuttle ride.

The Division of Labor Standards Enforcement Opinion Letter dated January 29, 2002, got it right in (1) stating that, absent the employer's control, the transit employees would not have chosen to end their shifts at a different location from where the shifts began, and (2) concluding that the transit employees were entitled to be paid for the travel time between the two points.

Accordingly, I would reverse.

MALLANO, P. J.